



(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 209, 216, and 252

RIN 0750-AH37

Defense Federal Acquisition Regulation Supplement: Award Fee Reduction or Denial for Health or Safety Issues (DFARS Case 2011-D033)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement those sections of the National Defense Authorization Acts for Fiscal Years 2010 and 2011, providing increased authorities to reduce or deny award fees to companies found to jeopardize the health or safety of Government personnel. In addition, this rule modifies the requirement that information on the final determination of award fee be entered into the Federal Awardee Performance and Integrity Information System (FAPIIS).

DATES: Effective Date: [Insert date of publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, telephone 703-602-1302.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the Federal Register at 76 FR 57674 on September 16, 2011, to implement sections 823 and 834 of the National Defense Authorization Acts (NDAA) for Fiscal Years (FY) 2010 and 2011, providing increased statutory authorities to reduce or deny award fees to companies found to jeopardize the health or safety of Government personnel and adding a mechanism to decrease or eliminate a contractor's award fee for a specific performance period. In addition, the interim rule implemented the modification by section 834 of section 872 of the NDAA for FY 2009, which required that information on the final determination of award fee be entered into the Federal Awardee Performance and Integrity Information System (FAPIIS). One respondent submitted a public comment in response to the interim rule.

II. Discussion and Analysis of the Public Comment

The Defense Acquisition Regulations Council (the Council) reviewed the public comment in the development of the final rule. A discussion of the comment is provided as follows:

A. Summary of significant changes

The interim rule is adopted, without change, as a final rule.

B. Analysis of public comment

Comment: The respondent noted that DFARS 209.105-2-70 uses the term "DoD appointing official," while the clause, at DFARS 252.216-7007(a)(ii)(E), states that the determination is made by the Secretary of Defense. The respondent suggested that the same term be used in both locations.

Response: The terminology used was carefully considered by DoD. Section 834 of the statute requires the Secretary of Defense to provide for an "expeditious, independent investigation" and "make a final determination, pursuant to procedures established by the Secretary for purposes of this section. Defense Criminal Investigative Organizations (DCIOs) currently have procedures in place to conduct criminal investigations of contractor misconduct. These procedures are outside the acquisition regulatory process, and, further, there are differences in the procedural processes followed within different parts of DoD. After consideration of the comment, DoD determined that the DFARS text at 209.105-2-70 should be as specific as possible for the guidance of the contracting officer, i.e., "the DoD appointing official that requested a DoD investigation makes a final determination..." However, DoD used the "Secretary of Defense" in the DFARS clause because it is not

necessary to specify to the contractor the delegation of authority within DoD.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because section 834 of the NDAA for FY 2011 does not apply to firms that are subject to the jurisdiction of U.S. courts. By definition, small businesses are U.S. businesses and, therefore, are subject to the jurisdiction of the U.S. courts. Accordingly, this rule will not affect small

businesses. For the definition of "small business," the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 USC 601(3) and 15 USC 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: "(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor."

This rule also implements section 823 of the NDAA for FY 2010. Section 823 required contracting officers to consider reduction or denial of award fee if the actions of the contractor or a subcontractor at any tier jeopardized the health or safety of Government personnel. DoD did not prepare an initial regulatory flexibility analysis upon publication of the interim rule implementing section 823 (75 FR 69360, effective November 12, 2010) because, generally, contracts awarded to small businesses are not likely to utilize incentive- and award-fee contract structures. No comments were received from small entities on the interim rule.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 209, 216, and 252

Government procurement.

Ynette R. Shelkin

Editor, Defense Acquisition Regulations System

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 209, 216, and 252, which was published at 76 FR 57674 on September 16, 2011, is adopted as a final rule without change.

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